

### **REMARKS**

Claims 27, 29, 31-33, 35-40, 44, 48-52, 54, 56-64, 67 and 71-76 are currently pending in this application. Claims 27 and 52 are amended herein. Claims 1-26, 28, 30, 34, 41-43, 45-47, 53, 55, 65, 66 and 68-70 were previously cancelled without prejudice or disclaimer as to the subject matter of the cancelled claims. Applicant respectfully reserves the right to prosecute the subject matter of the cancelled claims in one or more continuation or divisional applications.

### **Substance of Interview Pursuant to 37 C.F.R. § 1.133(b)**

In accordance with 37 C.F.R. § 1.133(b) and M.P.E.P. § 713.04, Applicants provide a summary of the telephonic interview of May 1, 2008. Applicants appreciate the courtesies extended by the Examiner during the interview. During the interview, it was discussed that Applicant would argue in the response that inclusion of “comprising” in claims 27 and 52 did not render the claims indefinite under 112, 2<sup>nd</sup> because this allows for the inclusion of additional elements, such as cells, in the endoprosthesis. The Examiner indicated that the argument would be brought to the attention of the QAS for further review, and alternative language may be suggested if the current claims are not acceptable. Applicants agreed to amend claims 27 and 52 to address a minor antecedent basis oversight.

### **Withdrawn Rejections**

Applicant appreciates the Examiner’s reconsideration and withdrawal of the prior rejections under 35 U.S.C. § 112, 2<sup>nd</sup> paragraph; 35 U.S.C. § 103(a) and the judicially created doctrine of obviousness-type double patenting.

### **Rejections**

*Rejections under 35 U.S.C. § 112, 2<sup>nd</sup> paragraph*

Claims 27, 29, 31, 33, 35-40, 44, 48-52, 54, 56-64, 67 and 71-76 were rejected under 35 U.S.C. § 112, 2<sup>nd</sup> paragraph, as allegedly indefinite for failing to particularly point out and distinctly claim the subject matter regarded as the invention by the Applicant.

Applicant respectfully disagrees and traverses this rejection.

The Office Action states that “[t]he claims are indefinite in that the ‘comprising language’ is found in the claims after ‘consisting essentially of’ language has been used.” See Office Action, page 3. Applicant respectfully disagrees and submits that the recitation of “consisting essentially of” with respect to the endoprosthesis clearly defines the metes and bounds of the claim with respect to this claim element, and distinguishes the endoprosthesis from materials which, for example, include a shell or other element that would materially change the nature of the endoprosthesis. The recitation of the term “comprises” with respect to the polymer also clearly defines the metes and bounds of the claim with respect to this claim element, which encompasses the polymers that are used to form the endoprosthesis.

This is further supported by the specification as originally filed, wherein it is stated for example that “[t]he term hydrogel relates to the polyacrylamide polymer of the invention comprising less than 3.5% polyacrylamide and at least 95% pyrogen-free water or saline solution whereas the term endoprosthesis relates to the hydrogel present in the body.” See published Patent Application no. U.S. 20020150550, paragraph [0015] (corresponding to the instant application). Applicant submits that this language further supports Applicant’s statement that the metes and bounds of the claim language is clear to the skilled artisan, as there is a distinction between the endoprosthesis and the polymer used to make the endoprosthesis. Accordingly, Applicant respectfully requests reconsideration and withdrawal of the rejection of claims 27, 29, 31, 33, 35-40, 44, 48-52, 54, 56-64, 67 and 71-76 under 35 U.S.C. § 112, 2<sup>nd</sup> paragraph.

#### *Rejections under Judicially Created Doctrine of Obviousness-Type Double Patenting*

Claims 27, 29, 31, 33, 35-40, 44, 48-52, 54, 56-64, 67 and 71-76 were rejected on the ground of non-statutory obviousness-type double patenting as allegedly unpatentable over claims 1-14 of U.S. Patent No. 7,186,419 (hereinafter the “‘419 patent”).

Applicants submit herewith a terminal disclaimer in compliance with the provisions of 37 C.F.R. § 1.321(c) in response to this double patenting rejection. Accordingly, Applicants respectfully request reconsideration and withdrawal of the rejection of claims 27, 29, 31, 33, 35-

40, 44, 48-52, 54, 56-64, 67 and 71-76 on the ground of non-statutory obviousness-type double patenting.

### CONCLUSION

An indication of allowance of all claims is respectfully solicited. Early notification of a favorable consideration is respectfully requested.

In the event any outstanding issues remain, Applicant would appreciate the courtesy of a telephone call to Applicant's undersigned representative to resolve such issues in an expeditious manner.

It is believed that no fees are due with the filing of this Response. However, if the U.S. Patent and Trademark Office determines that any variance exists between the amount due and the amount authorized above, the Commissioner is authorized to credit or debit any such variance to the undersigned's Deposit Account No. **50-0206**.

Respectfully submitted,

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